125

(4)

Supreme Court, U.S.
FILED
JAN 26 2009
OFFICE OF THE CLERK

No. 08-505

IN THE
Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ELLIOT E. POLEBAUM
Counsel of Record
EUGENE N. HANSEN
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 639-7000

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. THE ISSUES RAISED IN THE PETITION SHOULD BE CONSIDERED NOW 2

A. The Petition Is Not "Premature" 2

B. The Court Should Consider The Physical Takings Argument 5

II. THE IMPORTANT ISSUES RAISED IN THE PETITION REQUIRE THIS COURT'S IMMEDIATE REVIEW 7

A. The Federal Circuit's Holding That LIHPRHA Does Not Have The Character Of A Forced Physical Occupation Conflicts With *Loretto* 7

B. The Government Acknowledges That The Federal Circuit's Rigid Application Of The *Penn Central* Factors Conflicts With This Court's Precedents 9

C. The Federal Circuit Has Decided Issues Reserved By This Court In Ways That Will Eliminate Virtually All Temporary Regulatory Takings Claims Against The Federal Government 10

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE

CASES

Cienega Gardens v. United States,
503 F.3d 1266 (Fed. Cir. 2007) ..... *passim*

Cienega Gardens v. United States,
331 F.3d 1319 (Fed. Cir. 2003) 5

Cienega Gardens v. United States,
265 F.3d 1237 (Fed. Cir. 2001) 5, 7-8

Cienega Gardens v. United States,
67 Fed. Cl. 434 (2004) 4

Hendler v. United States,
952 F.2d 1364 (Fed. Cir. 1991) 8

Hodel v. Irving,
481 U.S. 704 (1987) ..... *passim*

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 7

Kimball Laundry Co. v. United States,
338 U.S. 1 (1949) 8

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 7

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) ..... *passim*

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978) ..... *passim*

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 11-12

PAGE

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 12-13

United States v. Gen. Motors Corp., 323 U.S. 373 (1945) 8

United States v. Pewee Coal Co., 341 U.S. 114 (1951) 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 6-7, 9

REPLY BRIEF OF PETITIONER CCA ASSOCIATES FOR A WRIT OF CERTIORARI

The government agrees that this Petition raises important constitutional issues and, indeed, does not dispute that the Federal Circuit's decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"), if allowed to stand, would eliminate the Federal Government's obligation to pay just compensation for virtually every temporary confiscation of private property through regulation. The government also agrees, at least implicitly, that *Cienega X* provides a roadmap for the government to avoid paying just compensation in *every* case for which a federal regulation confiscates private property: the government need only rescind the ostensibly "permanent" regulation, thereby making it "temporary," or, alternatively, provide some partially "offsetting benefits."

Equally significant for present purposes, the government implicitly concedes that the Federal Circuit's decision in *Cienega X*, in which the court ruled that an owner must suffer a "severe economic deprivation" in order to establish a regulatory taking, conflicts with this Court's ruling in *Hodel v. Irving*, 481 U.S. 704 (1987). *See* Br. for the United States in Opp'n ("Opposition" or "Opp.") at 19. *Hodel* eschewed any rigid application of the so-called *Penn Central* factors[1] and *held* that petitioners there had

---

[1] *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

suffered a regulatory taking, notwithstanding a miniscule economic loss.

Instead of questioning the importance of the issues raised in this Petition, the government principally contends that certiorari should be denied on the basis of its assertion that this Petition is premature. The government alternatively argues that certiorari should be denied because there purportedly is some basis for the Federal Circuit's holdings in prior Supreme Court precedents.

In making these arguments, the government distorts reality, selectively ignores the procedural history of this case, and misconstrues this Court's precedents. The nearly 6-year confiscatory period at issue in this case, depriving the Norman Family of more than 80% of the income that the Family otherwise would have earned during that period, requires just compensation. The Court should grant certiorari and resolve the important constitutional issues raised in the Petition.

I. THE ISSUES RAISED IN THE PETITION SHOULD BE CONSIDERED NOW

A. The Petition Is Not "Premature"

The government first argues that the Petition should be denied as premature because the Federal Circuit, in vacating the judgment in favor of the Norman Family, remanded the case for further proceedings in accordance with *Cienega X*. *See* Opp. 8-9. According to the government, "petitioner does not assert that it has no arguments to press on remand" and therefore may prevail on remand, rendering the Petition moot. *Id.*

The government misconstrues the Norman Family's position and fails to note the extent to which the *Cienega X* decision bars most, *if not virtually all*, temporary regulatory takings claims. In fact, there is no prospect for the Norman Family to prevail on remand.

Cienega X holds that any claimant who alleges that a temporary regulation has effected a taking must prove a severe diminution in the *lifetime value* of his or her property – even if the temporary regulation has lasted for years or was ostensibly permanent. *See* Pet. for a Writ of Cert. ("Pet.") at 27-36; App. to Pet. for a Writ of Cert. ("App.") at 116a-122a. According to the Federal Circuit, diminution in the lifetime value of a property may be determined in two ways: (i) by looking at the loss of income "over the entire useful life of the property" or (ii) by looking at the change in market value of the property at the time of the taking, considering the length of the regulation. App. 122a. These two approaches to measuring economic impact foreclose any regulatory takings claim by the Norman Family.

In fact, it is *mathematically impossible* for the Norman Family, under either of these two approaches, to establish a "severe economic deprivation" on the order of 75% or more as required by Federal Circuit precedent.[2] App. 121a ("a

---

[2] For example, if one assumes (i) a 30-year useful life of Chateau Cleary Apartments ("Chateau Cleary") as of May 1991 when the taking began, (ii) a government confiscation of 80% of the cash flow for 5 years (the Court of Federal Claims ("COFC") found that the Norman Family suffered an 81% loss over a period of nearly 6 years), (iii) no growth, and (iv) a huge discount rate of 15%, then the economic impact would be 40%.

regulatory taking does not occur unless there are serious financial consequences" that rise to the level of "severe economic deprivation"); *Cienega Gardens v. United States*, 67 Fed. Cl. 434, 470 (2004) (at least 75% loss is required under Federal Circuit precedent). The government already has developed evidence indicating that the Norman Family suffered an economic impact of less than 20% considering the lifetime value of Chateau Cleary. App. 71a.

In short, the government's position – "petitioner does not assert that it has no arguments to press on remand" – is simply wrong. The Norman Family has no possibility to prevail on remand under the Federal Circuit's test.

Finally, the notion that this Petition is premature is nothing if not ironic. This case already has been pending for nearly *12 years*. There has been full discovery, a 7-day trial, a site visit, judgment for the Norman Family and appeal. Nothing will be accomplished by delaying certiorari except the further delay of justice.

[Footnote continued from previous page]

If one used real-world assumptions, rather than these extreme, illustrative assumptions, the economic impact would only decrease.

Similarly, if one were to utilize the alternative measure endorsed by the Federal Circuit, the change-in-market-value approach, the economic impact would be even less. Indeed, at trial the government's expert testified without contradiction that the Norman Family suffered an economic impact of less than 20% under the change-in-market-value approach. App. 71a.

B. The Court Should Consider The Physical Takings Argument

The government next argues that the Court should deny certiorari because the Norman Family did not press in the lower courts the argument that the government's action here – forcing the Norman Family to house low-income, HUD-approved tenants for a period of years – resulted in a *per se*, physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Opp. 10-11. However, the government neglects to mention the reason why the Norman Family previously advanced a regulatory and not a physical takings theory: By the time of trial, the Federal Circuit unambiguously had held that an owner seeking just compensation for LIHPRHA's confiscation of the prepayment right must proceed under *Penn Central* and not a *per se*, physical takings theory. *See Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001) *("Cienega VI")* (rejecting owners' physical takings claims); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) *(Cienega VIII)*; Pet. 13-15, 22-23, 31-32 (discussing *Cienega VI* and *Cienega VIII* decisions).

The Federal Circuit's decision in *Cienega VI*, in which the court foreclosed any and all claims under *Loretto*, still stands. Absent this Court's review, there is no prospect of the Norman Family's succeeding on this theory in the future, just as there was no prospect of the Norman Family's succeeding on this theory at trial and on appeal.

The Court should reject as silly the government's suggestion that certiorari should be denied so that a further factual record can be developed. *See* Opp.

10. The COFC expressly found that LIHPRHA had the effect of confiscating the Norman Family's prepayment right and binding the Norman Family to the terms of the regulatory agreement with HUD for a period of 20 additional years. As found by the COFC, and not challenged by the government, the regulatory agreement, *inter alia*:

- limited the occupancy of Chateau Cleary to low- or moderate-income families;
- provided that all rents had to be approved by HUD;
- required that Chateau Cleary be managed "in a manner satisfactory to [HUD]"; and
- limited the Norman Family to an annual return on the initial equity investment of just 6%, or $12,952.

App. 8a. In other words, the undisputed facts establish that Congress, through LIHPRHA, compelled the Norman Family to house low-income tenants. The Norman Family lost completely the right to charge market rents or to tear down Chateau Cleary and make some other use of the land. When one HUD-approved tenant left, the Norman Family had no choice but to rent to some other HUD-approved tenant at a HUD-approved rate.

This Court obviously may and should decide the purely legal issue as to whether these facts establish a *per se*, physical taking under *Loretto*. Indeed, the government concedes as much in a footnote. *See* Opp. 11 n.1. As acknowledged by the government, this Court in *Yee v. City of Escondido* made explicit that a petitioner could present any argument in support of his or her claim for just compensation

under the Takings Clause, even if the argument was not made in the lower courts. *See* 503 U.S. 519, 534 (1992) ("We must also reject respondent's contention that the regulatory taking argument is not properly before us because it was not made below.").

II. THE IMPORTANT ISSUES RAISED IN THE PETITION REQUIRE THIS COURT'S IMMEDIATE REVIEW

The remainder of the government's Opposition offers a defense of the Federal Circuit's rulings in *Cienega VI* and *Cienega X*. Significantly, the government nowhere challenges the importance of the issues raised in the Petition, nowhere disputes that LIHPRHA defeated the Norman Family's right to exclude others (a right this Court has described as "perhaps the most fundamental of all property interests"[3]), and nowhere disputes that *Cienega X*, if left to stand, would foreclose virtually all temporary regulatory takings claims.

A. The Federal Circuit's Holding That LIHPRHA Does Not Have The Character Of A Forced Physical Occupation Conflicts With *Loretto*

The government makes a series of arguments in support of the Federal Circuit's decision in *Cienega VI*, where the court ruled, without citation to *Loretto*, that LIHPRHA did not have the character of a forced physical occupation, notwithstanding the

---

[3] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (the right to exclude "falls within [the] category of interests that the Government cannot take without compensation").

fact that LIHPRHA resulted in the compelled occupation of properties by low-income tenants. None has merit.

The government first says that the *Cienega VI* ruling is somehow consistent with *Loretto* because *Loretto* concerned a "permanent" physical occupation, as opposed to the "temporary" physical occupation resulting from LIHPRHA. This supposed "distinction" does not stand under this Court's precedents. The Court repeatedly has held that the government must provide just compensation for temporary physical occupations, including for occupations for less duration than the nearly 6-year occupation here. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).[4]

The government's other arguments similarly lack merit. For example, the government contends that LIHPRHA did not "altogether eliminate" the right to devise and exclude others because "LIHPRHA explicitly allowed owners to prepay their mortgages upon certain conditions [being met]." Opp. 12. The government neglects to mention that the COFC

---

[4] The *Loretto* Court's reference to a "permanent" physical occupation means that a brief trespass by the government does not raise Takings Clause issues. *See Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass. . . .").

made express findings that those conditions could not be satisfied by the Norman Family. App. 42a.

The government also presses the argument that "LIHPRHA was more like a rent-control statute than a physical invasion." Opp. 12. This manifestly is not so. Rent control statutes do not require the landlord to continue renting his or her land. *See Yee*, 503 U.S. at 527-28. LIHPRHA did precisely this, compelling the Norman Family to rent to low-income tenants for an additional 20 years. *Compare id.* at 528 ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.").

The government finally says that it somehow matters that the Norman Family and other owners participating in the HUD programs "initially invited" the low-income tenants by entering into regulatory agreements with HUD. Opp. 13. But the government overlooks the critical fact that the "invitation" only extended for 20 years, after which point the owners could prepay their mortgages and enjoy their properties however they pleased, free of any restriction.

B. The Government Acknowledges That The Federal Circuit's Rigid Application Of The *Penn Central* Factors Conflicts With This Court's Precedents

The government admits that this Court's decision in *Hodel* holds that the claimants there established a compensable regulatory taking, notwithstanding the minimal economic impact and the likely absence of investment-backed expectations. Opp. 19 ("[T]he Court in *Hodel* analyzed all three *Penn Central*

factors before concluding that the plaintiffs had established a taking because the 'character of the Government regulation' was sufficiently 'extraordinary' to outweigh weaker showings on the other factors."). The government also admits, because it does not dispute, that Federal Circuit precedent requires that an owner suffer a "severe economic deprivation," or more than a 75% loss in the lifetime value of the property, in order to establish a regulatory takings claim. *See* Pet. 25; App. 121a.

These admissions alone confirm the need for this Court's immediate review. There is no way to square the Federal Circuit's inflexible requirement of a "severe" economic loss and the *Hodel* Court's holding that a regulatory taking may be found *regardless of the severity of the economic impact* where the character of the governmental action is "extraordinary." (The character of the governmental action here – depriving the Norman Family of the fundamental right to exclude others – was the most extraordinary of all governmental actions. Pet. 26. The government does not argue otherwise.)

Tellingly, the government does not even try to address this conflict but instead misrepresents the Norman Family's argument for certiorari. *Compare* Pet. 24-27 *with* Opp. 19.

C. The Federal Circuit Has Decided Issues Reserved By This Court In Ways That Will Eliminate Virtually All Temporary Regulatory Takings Claims Against The Federal Government

The Court should grant certiorari not only to resolve the conflict between Federal Circuit

precedent and this Court's decisions in *Loretto* and *Hodel*, among others, but also because the Federal Circuit in *Cienega X* decided important issues reserved by prior decisions of this Court. In particular, the Federal Circuit ruled in *Cienega X* that statutory "offsetting benefits" must be considered in determining whether there has been a taking and, further, that the lifetime value of property must be considered in determining the economic impact of any regulation. App. 116a-131a. The government disputes neither the importance of these issues nor the twin facts that (i) the Federal Circuit's resolution of these issues will eliminate nearly every temporary regulatory takings claim against the Federal Government and (ii) the Federal Government can escape its duty to pay just compensation in every case by either providing some "offsetting benefits" or by rescinding the offending regulation, thereby making it "temporary."

First, the Court should decide whether an owner's ability to receive partially "offsetting benefits" must be considered in evaluating whether there has been a taking. Absent this Court's review, the Federal Circuit's ruling would permit the government to escape paying just compensation in every case. Justice Scalia made precisely this point in *Suitum v. Tahoe Regional Planning Agency*. *See* 520 U.S. 725, 748 (1997) (Scalia, J., concurring) ("If money that the government-regulator gives to the landowner can be counted on the question of whether there is a taking . . . rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less.").

The government nonetheless argues that the partially offsetting benefits under LIHPRHA – the so-called "incentives" option and "sale" option – are distinguishable from the Transferable Development Rights ("TDRs") discussed in Justice Scalia's concurring opinion in *Suitum*.

This is not so. Justice Scalia analogized the TDRs to a cash payment from the government. *Id.* at 747. The "options" available to the Norman Family under LIHPRHA were no different. The "incentives" option, as the name suggests, was the equivalent of a cash payment from the government. Participating owners could receive, by way of example, greater cash dividends and subsidies. App. 128a-129a. The "sale" option likewise amounted to a cash payment after the conveyance of the property in a HUD-sanctioned process to a HUD-approved buyer. App. 126a.

Finally, the Court should grant certiorari to review the Federal Circuit's requirement that the lifetime value of property must be considered in measuring the economic impact of a regulation. Otherwise, as noted above, *supra* at 3-4, and in the Petition at 31-36, there will be no prospect for establishing a successful regulatory takings claim (at least for any regulation of finite duration).

In opposition, the government asserts only that the "lifetime-value" rule is compelled by the parcel-as-a-whole rule. Opp. 17-18. However, as implicitly acknowledged by the government, the only decision of this Court extending the parcel-as-a-whole rule to temporal considerations is *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). As explained in substantial detail in the Petition at 32-34, and

without rebuttal by the government, *Tahoe-Sierra* provides zero support for the Federal Circuit's lifetime-value rule. To the contrary, *Tahoe-Sierra* and numerous other decisions of this Court (tellingly not addressed by the government) wholly undermine the Federal Circuit's requirement to consider the lifetime value of a property in determining economic impact. Pet. 32-36.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ELLIOT E. POLEBAUM
Counsel of Record
EUGENE N. HANSEN
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 639-7000